

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 2

Docket No. CH-0351-05-0233-I-1

**Denise Shannon,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

January 7, 2009

Tinita Cole, President, A.F.G.E. Local 2209, Dayton, Ohio, for the
appellant.

Dennis M. McGuire, Esquire, Dayton, Ohio, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed her appeal as withdrawn. For the reasons set forth below, to the extent the appellant's submission constitutes a petition for review, we DISMISS it as untimely filed without a showing of good cause. To the extent the appellant's submission may be deemed a request to reopen her appeal, we DENY her request for the reasons also set forth below.

BACKGROUND

¶2 The appellant filed a December 15, 2004 appeal through her union representative, in which she challenged the agency's decision to abolish her position as part of a reduction in force (RIF) based on a reorganization of the Veterans Administration Medical Center (VAMC) where she is stationed. Initial Appeal File (IAF), Tab 1. The appellant did not submit any personnel documentation in support of her appeal. *Id.* After the administrative judge (AJ) issued the acknowledgement order, the appellant's union representative filed a January 21, 2005 request to withdraw her appeal so that she could pursue an alternative method of addressing her claim. IAF, Tab 3. The AJ thereafter issued a February 7, 2005 initial decision dismissing the appellant's appeal as withdrawn. IAF, Tab 4. The initial decision informed the appellant that the withdrawal of an appeal is an act of finality that removes the appeal from the jurisdiction of the Board. *Id.* at 2. The initial decision also informed the appellant that it would become the final decision of the Board on her appeal if a petition for review was not filed by March 14, 2005. *Id.* at 3. The appellant did not file a timely petition for review.

¶3 The appellant has now filed a July 28, 2008 appeal form with the Board's Headquarters Office, rather than with the Board's Central Regional Office where her withdrawn appeal was filed. Petition For Review File (PFRF), Tab 1. The appellant asserts, in effect, that the agency improperly [a]bolish (sic) only part of the Health Technician series," in conducting its RIF-based reorganization. PFRF, Tab 1 at 3.

¶4 The Clerk of the Board informed the appellant that her petition for review appeared to be untimely, because it should have been filed on or before March 14, 2005, and that the Board's regulations require untimely filed petitions to be accompanied by a motion to accept the petition as timely filed and/or to waive the filing time limit for good cause and an affidavit or sworn statement setting forth good cause for the untimely filing. PFRF, Tab 2. The Clerk enclosed a copy of

the Board's "Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit" and ordered the appellant to file her motion and an affidavit or sworn statement setting forth good cause for the untimely filing on or before August 14, 2008. *Id.* On August 5, 2008, the appellant filed a sworn copy of her motion to accept the filing as timely and/or to waive the filing time limit. PFRF, Tab 3. In her motion, the appellant asserts that at the time the agency abolished the GS-0640 Health Technician Series neither the agency nor her union informed her of her right to appeal. *Id.* at 1. The appellant asserts that it was not until the agency reopened some Health Technician positions that she decided to file her instant appeal and inquire as to the agency's authority to abolish some, but not all, of the Health Technician positions at the VAMC in Dayton, Ohio, where she works. *Id.* The appellant has filed a copy of her September 18, 2005 directed reassignment from the position of GS-0640-6 Health Technician to the position of GS-0679-6 Lead Medical Support Assistant, which did not result in a reduction in grade or pay, and a copy of a May 8, 2008 vacancy announcement for a Health Technician position at the VAMC where she is stationed. *Id.*, attachments. Thus, the appellant is reasserting her challenge to the agency's RIF-based reorganization decision to eliminate some or all of the Health Technician positions at the VAMC where she is stationed.

ANALYSIS

¶5 The Board treats a request to reopen an initial decision that became final when neither party petitioned for review as an untimely filed petition for review. *See Valdez v. Office of Personnel Management*, [103 M.S.P.R. 88](#), ¶ 4 (2006); *Dunn v. Department of the Army*, [100 M.S.P.R. 89](#), ¶ 5 (2005); *Blair v. Office of Personnel Management*, [89 M.S.P.R. 113](#), ¶ 9 (2001), *aff'd*, 31 F. App'x 646 (Fed. Cir. 2002). Therefore, we will initially consider the appellant's submission as an untimely filed petition for review.

¶6 A petition for review must generally be filed within 35 days after the date of the issuance of the initial decision, or, if the appellant shows that the initial decision was received more than 5 days after the initial decision was issued, within 30 days after the date the appellant received the initial decision. [5 C.F.R. § 1201.114](#)(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause for the untimely filing of a petition, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of her excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file her petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶7 The appellant has not alleged that she received the initial decision more than 5 days after it was issued. Thus, the appellant's petition for review should have been filed on or before March 14, 2005, as she was correctly informed in the initial decision, and her instant petition was untimely filed by more than 3 years. The Board has declined to find good cause for a waiver of the filing time limit where, as here, the initial decision clearly notified the appellant of the correct time limit for filing a petition for review. *See Valdez*, [103 M.S.P.R. 88](#), ¶ 7. Further, a delay of 3 years is not minimal. *See, e.g., Dean v. U.S. Postal Service*, [100 M.S.P.R. 556](#), ¶ 5 (2005) (a delay of 6 months is not minimal); *Gaines v. U.S. Postal Service*, [96 M.S.P.R. 504](#), ¶ 7 (2004) (a delay of 37 days is not minimal).

¶8 Additionally, the record reflects that the appellant withdrew her appeal so as to pursue an alternative method of addressing her claim. IAF, Tab 3. The Board has found that an appellant's decision to file her claims in other fora does not establish good cause for an untimely filed petition for review. *See Wirzberger v. Department of the Treasury*, [101 M.S.P.R. 448](#), ¶ 10 (2006), *review dismissed*, 212 F. App'x 965 (Fed. Cir. 2006) (Table). Although the appellant asserts that she was not aware of her right to file a Board appeal because she was not informed of her right to appeal by either the agency or her union, the record refutes her assertion that she was denied the right to appeal. Even if the appellant's union actually failed to inform her that it had filed an appeal on her behalf, the Board's acknowledgement order, a copy of which was sent directly to her, did. IAF, Tab 2. The appellant's union also sent her a copy of the motion to withdraw her appeal and, further, a copy of the initial decision dismissing her appeal as withdrawn was sent directly to her. IAF, Tabs 3, 5. The appellant did not contest the motion to withdraw or file a petition for review of the initial decision's dismissal of her appeal as withdrawn. Moreover, an appellant is generally responsible for the errors of her chosen representative. *Matson v. Office of Personnel Management*, [105 M.S.P.R. 547](#), ¶ 20 (2007); *White v. Department of Justice*, [103 M.S.P.R. 312](#), ¶ 12 (2006) ("An appellant has a personal responsibility to monitor the progress of his appeal at all times, and not to leave the matter entirely in the hands of his representative."), *aff'd*, 230 F. App'x 976 (Fed. Cir. 2007).

¶9 Because the appellant withdrew her appeal below, her petition for review can also be construed as a request to reopen that appeal. *See Powell-Johnson v. U.S. Postal Service*, [103 M.S.P.R. 340](#), ¶ 13 (2006). Generally, an appellant's withdrawal of an appeal is an act of finality that has the effect of removing the appeal from the Board's jurisdiction. *See id.*; *Bligen v. U.S. Postal Service*, [100 M.S.P.R. 303](#), ¶ 10 (2005). Further, the Board's authority to reopen a case is limited by the requirement that such authority be exercised within a reasonably

short period of time. *See Mitchell v. Department of Commerce*, [100 M.S.P.R. 415](#), ¶ 9 (2005), *review dismissed*, 175 F. App'x 340 (Fed. Cir. 2006); *Bagunas v. U.S. Postal Service*, [100 M.S.P.R. 328](#), ¶ 5 (2005). That period of time is usually measured in weeks, not months or years. *Bagunas*, [100 M.S.P.R. 328](#), ¶ 5. In addition, in the absence of an error that implicates an employee's basic procedural rights, in which case the Board will reopen a case sua sponte to prevent manifest injustice, the Board will not reopen an appeal to cure the untimeliness of a petition for review. *See Sellers v. U.S. Postal Service*, [98 M.S.P.R. 44](#), ¶ 7 (2004). The appellant has not established such an error in this case; accordingly, we decline to exercise our discretion to reopen her appeal.

¶10 Accordingly, we DISMISS the petition for review as untimely filed and we DENY the appellant's request to reopen her previously withdrawn appeal.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.